Lembaga Kumpulan Wang Simpanan Pekerja v Richmatt Holding (M) Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO S-21–180 OF 2009
LEE SWEE SENG JC
16 AUGUST 2010

Civil Procedure — Summary judgment — Application for — Arrears of contribution to EPF — Two-fold test — Whether plaintiff established prima facie case for O 14 — Whether triable issues raised — Whether amount certified correct — Whether there was collateral agreement for settlement — Whether commencement of criminal prosecution precludes plaintiff from recovery by civil claim

Labour Law — Provident fund — Contributions — Computation of arrears — Whether Form EPF 7 needs to be declared by employer or could be assessed by inspector — Whether certificate of indebtedness prima facie evidence of contribution owing — Whether open to defendants to challenge imposition of dividends and interest — Whether defendants jointly and severally liable for arrears — Whether commencement of criminal prosecution precludes plaintiff from recovery by civil claim — Employees Provident Fund Act 1991 ss 45(3), 46 & 49

The plaintiff was a board established under the Employees Provident Fund Act 1991 ('the Act') to manage the employees provident fund ('EPF'), a fund towards which all employers and employees were legally required to contribute every month. The first defendant was a company incorporated in Malaysia with a number of employees in its payroll, while the second, third and fourth defendants were all directors of the first defendant at the material time. The first defendant company had failed to pay the EPF contributions amounting to RM696,803 from January 2007 to February 2008. The plaintiff issued notices of demand for the outstanding EPF contributions for the employees of the first defendant to all the four defendants. Although the first defendant made a part payment amounting to RM173,722, it failed to settle the whole amount outstanding. The plaintiff commenced a civil claim against the defendants for the balance sum of RM523,031 together with dividends at different rates for the different years and also interests and cost. The plaintiff then proceeded with the present O 14 application for summary judgment. The calculation of the arrears of unpaid EPF contributions as assessed by the plaintiff's inspector was set out in the Form EPF7 in the affidavit in support of the plaintiff's application for summary judgment. The defendants contended that summary judgment should not be granted against them because there were triable issues.

The defendants submitted that there was no provision for the plaintiff to issue and assess Form EPF 7 through its inspector and that the Form EPF 7 ought to be declared by the employer. The defendants also submitted that there was a collateral agreement for settlement between the parties and challenged the imposition of dividends and interests by the plaintiff. The defendants further submitted that since criminal prosecution had been taken against the first defendant, the plaintiff could not now recover the arrears of unpaid EPF contributions by way of a civil claim against the first defendant and its directors. The issues for consideration in this case were whether the plaintiff had established a prima facie case for O 14 and whether the issues raised by the defendants were triable issues.

Held, allowing the application with costs:

(1) The EPF Rules clearly provide that the Form EPF 7 can either be declared by the employer or assessed by the inspector of the plaintiff and thus there was no merit in the defendants' submission that the said form had to be declared by the employer (see para 13).

(2) The defendants had failed to discharge the prima facie evidence of their indebtedness. Merely stating that one did not agree or making no admission as to the amount owing that had been so certified was insufficient to discharge the burden that had shifted to the defendants (see para 14).

(3) A mere assertion that a settlement had been arrived at when there was no evidence to substantiate it could not create a triable issue (see para 16).

(4) The rates published by the plaintiff in the electronic and print media had to be accepted as correct in the absence of any evidence to the contrary. In any case, under ss 45(3) and 49 of the Act, the employer was liable to pay dividend and interest on the arrears of contributions of the employer's and employee's contributions as calculated by the Board (see paras 17–19).

(5) The second to fourth defendants, as directors of the first defendant company were personally, jointly and severally liable with the first defendant company for non-payment of EPF contributions. Thus the defendants' argument that the plaintiff cannot recover the amount outstanding by way of a civil claim against them is without merit (see paras 22–23).

[Bahasa Malaysia summary

Plaintif adalah Lembaga yang ditubuhkan di bawah Akta Kumpulan Wang Simpanan Pekerja 1991 ('Akta') untuk menguruskan wang simpanan pekerja ('EPF'), simpanan di mana majikan dan pekerja dikehendaki oleh undang-undang untuk menyumbang setiap bulan. Defendan pertama adalah

syarikat yang ditubuhkan di Malaysia dengan sejumlah pekerja yang bekerja dengannya, sementara defendan-defendan kedua, ketiga dan keempat kesemuanya adalah pengarah-pengarah defendan pertama pada masa material. Defendan pertama telah gagal membayar sumbangan sebanyak RM696,803 dari Januari 2007 hingga Februari 2008. Plaintif mengeluarkan notis tuntutan untuk sumbangan EPF tertunggak bagi pekerja defendan pertama kepada keempat-empat defendan. Walaupun defendan pertama membuat sebahagian pembayaran berjumlah sebanyak RM173,722, ia gagal untuk menyelesaikan jumlah kesemua bayaran tertunggak tersebut. Plaintif memulakan tuntutan sivil terhadap defendan-defendan untuk baki jumlah sebanyak RM523,031 bersama dividen pada kadar berbeza untuk tahun yang berbeza dan juga faedah dan kos. Plaintif kemudian meneruskan dengan permohonan A 14 ini untuk penghakiman terus. Perkiraan sumbangan EPF yang tertunggak seperti yang ditaksir oleh inspektor plaintif dinyatakan di dalam Borang EPF 7 di dalam afidavit sokongan terhadap permohonan penghakiman terus plaintif. Defendan-defendan berhujah bahawa penghakiman terus tersebut tidak patut diberi terhadap mereka kerana terdapat isu-isu yang boleh dibicarakan. Defendan-defendan berhujah bahawa tidak terdapat peruntukan untuk plaintif mengeluarkan dan menaksir Borang EPF 7 melalui inspektornya dan bahawa Borang EPF 7 patut diisytiharkan oleh majikan. Defendan-defendan juga berhujah bahawa terdapat perjanjian kolateral untuk penyelesaian di antara pihak-pihak dan mencabar pengenaan dividen dan faedah oleh plaintif. Defendan-defendan selanjutnya berhujah bahawa memandangkan pendakwaan jenayah telah dikenakan terhadap defendan pertama, plaintif tidak dapat mendapatkan kembali sumbangan tertunggak EPF yang tidak dibayar melalui tuntutan sivil terhadap defendan pertama dan pengarah-pengarahnya. Isu-isu untuk pertimbangan di dalam kes ini adalah sama ada plaintif telah membuktikan kes prima facie untuk A 14 dan sama ada isu-isu yang dibangkitkan oleh defendan-defendan adalah isu-isu yang boleh dibicarakan.

Diputuskan, membenarkan permohonan dengan kos:

(1) Peraturan-Peraturan EPF jelas memperuntukkan bahawa Borang EPF 7 boleh diisytiharkan sama ada oleh majikan atau ditaksir oleh inspektor plaintif dan oleh itu tidak ada merit dalam hujahan defendan-defendan bahawa borang tersebut mesti diisytiharkan oleh majikan (lihat perenggan 13).

(2) Defendan-defendan telah gagal untuk membuktikan keterangan prima facie mengenai keberhutangan mereka. Dengan hanya menyatakan bahawa seseorang tidak bersetuju atau tidak membuat pengakuan mengenai jumlah yang terhutang yang telah disahkan adalah tidak mencukupi untuk melepaskan beban yang telah beralih kepada defendan-defendan (lihat perenggan 14).

(3) Hanya kenyataan tegas bahawa penyelesaian telah dicapai di mana tidak terdapat keterangan untuk mengesahkannya tidak dapat membentuk isu yang boleh dibicarakan (lihat perenggan 16).

(4) Kadar yang diumumkan oleh plaintif dalam media elektronik dan cetak mesti diterima sebagai betul di dalam ketiadaan apa-apa keterangan yang bertentangan. Walau bagaimanapun, di bawah ss 45(3) dan 49 Akta, majikan bertanggungjawab untuk membayar dividen dan faedah atas sumbangan tertunggak sumbangan majikan dan pekerja seperti yang dikira oleh Lembaga (lihat perenggan 17–19).

(5) Defendan-defendan kedua hingga keempat, sebagai pengarah-pengarah defendan pertama secara peribadi, bersesama dan berasingan bertanggungjawab dengan defendan pertama kerana tidak membayar sumbangan EPF. Oleh itu hujahan defendan bahawa plaintif tidak boleh mendapatkan kembali jumlah tertunggak melalui tuntutan sivil terhadap mereka adalah tanpa merit (lihat perenggan 22–23).]

Notes

For cases on application for summary judgment, see 2 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 7895–7945.

For cases on contributions, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1669–1678.

Cases referred to

Bank Negara Malaysia v Mohd Ismail Ali Johor & Ors [1992] 1 CLJ 14 (Rep), SC (refd)

National Company for Foreign Trade v Kayu Raya Sdn Bhd [1984] 2 MLJ 300; [1984] 1 CLJ (Rep) 283, FC (refd)

Ong Kim Chuan & Anor v Lembaga Kumpulan Wang Simpanan Pekerja [2009] 5 MLJ 807; [2009] 6 CLJ 586, CA (refd)

Legislation referred to

Employees Provident Fund Act 1991 ss 14(1), (3), 45(3), 46, 49, 64, 65(1)
Employees Provident Fund Rules 1991 r 28, Form EPF 7
Rules of the High Court 1980 O 14

Noor Asnie M Salleh (Edlin Ghazaly & Associates) for the plaintiff.
Cherian Kuruvila (Feroz & Co) for the defendants.

Lee Swee Seng JC:

PROLOGUE

[1] The Employees Provident Fund was established under the Employees Provident Fund Act 1991 ('EPF Act') as a compulsory savings for all citizens

employed under a contract of service with the private sector in Malaysia. The employer would contribute 12% of the employees' basic salary to the Fund every month and the employee 11% of his salary. Through the years it has given an annual dividend of higher rate compared to savings in fixed deposits from the commercial banks. Withdrawals are allowed for a house and for major medical treatment and upon reaching 50 years of age one is entitled to withdraw the whole amount contributed plus the dividends earned.

[2] However there are problems when the employer fails to contribute to the EPF for its employees. Generally that is a first sign of a company in distress. The employees feel aggrieved because his half yearly statement showed no change in the statement of contributions he has in his EPF account and yet the employer has been deducting the employee's salary his portion of the EPF contribution.

[3] This is compounded further by the employer not contributing the employer's portion of the EPF contribution. Complaints would be made by the employees and upon completion of investigation by EPF Board, both criminal charges and civil claims would be filed against the company and the directors concerned so as to protect the interests of the employees who only have their EPF savings as the only financial security upon retirement.

PARTIES

[4] The plaintiff is established under the EPF Act and under s 14(1) it has such powers and shall perform such duties as are given or imposed by the EPF Act. Under s 14(3) it may employ, inter alia, advocates and solicitors to transact any business or do any act required to be transacted or done in the exercise of its powers or in the carrying out of its duties or for the better carrying into effect of the purposes of the EPF Act.

[5] The first defendant is a company incorporated in Malaysia and having a number of employees in its payroll. The second, third and fourth defendants are all directors of the company at the material time.

PROBLEMS

[6] The first defendant had failed to pay EPF contributions from January 2007 until February 2008 amounting to RM696,803 and the calculation of the arrears of unpaid contribution is set out in Form EPF 7 (Form E) of the EPF Act in the affidavit in support of the plaintiff's application for summary judgment.

[7] The first defendant had also made a part payment amounting to RM173,722 but failed to settle the whole amount outstanding. The plaintiff in

the discharge of its public duty had commenced this civil claim against the defendants for the balance sum of RM523,031 together with dividends at different rates for the different years and also interests and cost. Prior to that notices of demand had been issued on all the defendants on 26 May 2008 and copies and proof of posting are all exhibited in the plaintiff's affidavit in support.

PRAYERS

[8] The O 14 of the Rules of the High Court 1980 ('RHC') was taken out for the following:

(a) Outstanding EPF contributions for the employees of the first defendant from January 2007 to February 2008 for the sum of RM523,031 from the first defendant, second defendant, third defendant and fourth defendant.

(b) Dividend of 5.8%pa for year 2007, 4.5%pa for year 2008 and subsequent dividends as declared by EPF Board for each year until the date of full realisation.

(c) Interest of 6%pa for the time period from 24 February 2006 until 6 February 2007, 6.15% interest per annum from the time period from 7 February 2007 until 23 January 2008, 6.8%pa for the time period from 24 January 2008 until the date fixed by the EPF Board and subsequent interest as declared by the EPF Board for each year until the date of full realisation.

PRINCIPLES

[9] The law journals are replete with a legion of cases on the principles governing an O 14 application. If a restatement of the approach that the courts have consistently taken is necessary by way of reminder then reference can be made to the Federal Court case of *National Company for Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300 at pp 301–302; [1984] 1 CLJ (Rep) 283 at p 285 in the speech of George Seah FCJ:

> We think it appropriate to remind ourselves once again that in every application under O 14 the first considerations are (a) whether the case comes within the order and (b) whether the plaintiff has satisfied the preliminary requirements for proceeding with O 14.
>
> …
>
> If the plaintiff fails to satisfy either of these considerations, the summons may be dismissed. If however, these considerations are satisfied, the plaintiff will have established a prima facie case and he comes entitled to judgment. The burden then shifts to the defendant to satisfy the court why judgment should not be given against him (see O 14 rr 3 and 4(1)).

First triable issue: that the amount certified as owing is incorrect

[10] The relevant portion of r 28 of the EPF Rules 1991 reads:

> Where an employer has for any reason whatsoever not paid any contributions either wholly or partially by the twenty-first day of the month … such employer shall submit to the Board a schedule of arrears of contributions in Form EPF 7 (Form E) either assessed by the Inspector or declared by the employer himself and an arrears remittance statement in the Form EPF 8 (Form F) together with any contributions omitted to have been paid.

[11] Form EPF 7 had been exhibited in the plaintiff's affidavit in support and there is nothing to suggest that it had not been properly prepared by the inspector.

[12] Further there was also a certificate issued pursuant to s 64 of the EPF Act with respect to the arrears of EPF contributions and s 64 reads:

> In any legal proceedings, a certificate in relation to a claim on contributions payable and duly certified by an authorized officer of the Board shall be prima facie evidence of such certificate having been made and of the truth of the contents thereof.

[13] The defendants submitted that there is no provision for the plaintiff to issue and assess Form EPF 7 through its inspector and that the Form EPF 7 has to be declared by the employer. I find no merit in that argument as to do so would go against the clear provision of the EPF Rules which provides that Form EPF 7 can either be declared by the employer or assessed by the inspector of the plaintiff and one does have to be blessed with much imagination to countenance circumstances where such an assessment is necessary as in cases where there has been dereliction of duty or delay or even defiance in submitting the said form.

[14] The defendants has also failed to discharge the prima facie evidence of their indebtedness by adducing evidence to the contrary and by merely saying that one does not agree or make no admission as to the amount owing that has been so certified is insufficient to discharge the burden that has shifted to the defendants.

Second triable issue: that there was a collateral agreement in that there was a settlement agreement between the parties

[15] Exhibit RM1 in the defendants' affidavit disclosed that the first defendant had made admission of the amount of RM755,455 outstanding in their letter of 30 April 2008. The payment of RM173,772 was acknowledged

by the plaintiff. As to how the plaintiff had agreed to accept the part payment of RM173,772 and hence settled with the defendants is not stated. It is a long short at creating a triable issue when there is none. One would have expected a clear and unequivocal acceptance extracted from the plaintiff in no uncertain terms if indeed there is a settlement surmised and submitted by the defendants' counsel.

[16] A mere assertion that a settlement had been arrived at when there is no evidence to substantiate it cannot create a triable issue. Otherwise all that defendants need to do to defeat an O 14 application to canvass all the defences known under the law and to state that in the defence filed and to dress them properly in the affidavits to oppose the application and that would have done the trick! Surely it is not the number of issues raised that is the final determinant as to whether a triable issue has been raised but the quality of the issues raised. I can do no better than to repeat the reminder issued by Mohd Azmi SCJ in *Bank Negara Malaysia v Mohd Ismail Ali Johor & Ors* [1992] 1 CLJ 14 (Rep) at p 19:

> Under an O 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. In our opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O 14 application. Thus, apart from identifying the issues of fact or law, the court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.

[17] The defendants also sought to attack the correctness of the amount outstanding by asserting that the dividends and interests imposed are questionable. Again these are rates that the plaintiff had published in the electronic and print media. In the absence of contrary evidence the court will have to accept the rates to be correct. These rates are for the benefit of the employees any way and again it is imprudent of the defendants to suggest otherwise in the absence of evidence to the contrary.

[18] It might be appropriate at this juncture to refer to the EPF Act where the liability of the employer to pay dividends and interest on the arrears of contributions of the employer's and employee's contributions are concerned. Section 45(3) provides, inter alia:

> Notwithstanding section 49, …, the employer shall in addition to such contributions be liable to pay dividend which would have accrued on such contributions if such contributions had been paid to the employer within the prescribed period at the rate as declared under section 27 in accordance with any manner and calculation determined by the Board:

[19] Section 49 of the EPF Act provides for the imposition of interest as follows:

> Where the amount of the monthly contributions or part of any monthly contributions which an employer is liable to pay under section 45 is not paid within such period as prescribed by the Minister, *the employer shall be liable, in addition to the dividend to be paid under subsection 45(3), to pay interest to be credited to the Fund on such amount at such rate and it accordance with any manner and calculation determined by the Board*.
>
> (Emphasis added.)

Third triable issue: that the criminal prosecution having been taken against the first defendant, the plaintiff now cannot recover the amount outstanding by way of a civil claim against the first defendant and its directors

[20] The above contention is without merit. The relevant part of s 46 of the EPF Act provides:

> Where any contributions remaining unpaid a company, a firm or an association of persons, then, notwithstanding anything to the contrary in this Act or any other written law, *the directors of such company including any persons who were directors of such company during such period in which contributions were liable to be paid*, … shall together with the company, firm or association of persons liable to pay the said contributions, be jointly and severally liable for the contributions due and payable to the Fund. (Emphasis added.)

[21] Section 65(1) of the EPF Act further provides:

> Notwithstanding the provisions of any other written law all contributions payable under this Act may, without prejudice to any other remedy, be recoverable by the Board summarily as a civil debt.

[22] The liability of the directors for non-payment of contributions of EPF under s 46 of the EPF Act has received judicial interpretation in the Court of Appeal in *Ong Kim Chuan & Anor v Lembaga Kumpulan Wang Simpanan Pekerja* [2009] 5 MLJ 807 at p 813; [2009] 6 CLJ 586 at p 593 where His Lordship Ramly Ali JCA said:

A The liability under s 46 on the appellants is created by statute 'directly' and 'personally' on the appellants as directors or former directors of the first defendant company. *Thus the contributions due and payable become the debt of the appellants personally, jointly and severally with the company. Therefore, the appellants' argument that they were 'not personally liable for the debt of the company' cannot hold water*. (Emphasis added.)

B

PRONOUNCEMENT

[23] Having considered all the above arguments raised by the defendants' C counsel in seeking to raise a triable issue, I am more than satisfied that no single issue that merit going for trial has been raised. In the circumstance I granted an order in terms of the plaintiff's application for summary judgment with cost.

Application allowed with costs.

D

Reported by Kohila Nesan

E

F

G

H

I